Slovenia, European Court of Human Rights, 58512/16, Judgment of 30 June 2020

Member State

Slovenia

Topic

Trust:

- Freedom of Expression of judges and prosecutors
- Limits in the dissatisfaction towards the Judiciary

Accountability:

- The use of social media

Rule of law:

- Prohibition of arbitrariness

Independence:

- Recruitment and appointment of magistrates

Deciding Court Original Language

European Court of Human Rights

Deciding Court English translation

European Court of Human Rights

Registration N

Application no. 58512/16

Date Decision

30 June 2020

ECLI (if available)

ECLI:CE:ECHR:2020:0630JUD005851216

ECtHR Jurisprudence

See decision of the ECtHR

Subject Matter

The ECtHR interpreted the right to freedom of expression (Article 10 ECHR) in a case, where the applicant, a candidate for court expert in the field of construction, was tuned down due to his critical and allegedly inappropriate and insulting blog posts.

Legal issue(s)

The case concerns public trust in the judiciary in the wider sense. The central issue is, whether the Minister of Justice (and subsequently the national courts), who turned down the application of the candidate before the candidate made an oath, but after the candidate was selected, violated the applicant's right to freedom of expression. In his decision, the Minister relied on critical and allegedly inappropriate and insulting blog posts, inappropriate criticism and attitude towards the Ministry of Justice, and found that the candidate is not personally unsuitable for the performance of his duties as a court expert.

National Law Sources

Articles 87, 88 of the Courts Act

Facts of the case

On 25 April 2013, the applicant applied for a position of court expert in field of construction. After passing a test of professional knowledge and being examined by a six member commission of experts in the field. On 19 May the Minister of Justice issued a certificate confirming that the applicant had successfully passed the examination. "On 10 and 23 June 2014 the applicant sent letters to the Ministry of Justice ("the Ministry") in which he complained of delays in the proceedings and asked to take the relevant oath (taken by court experts) before the summer holidays. The applicant's taking of the oath was first scheduled for 4 July 2014, but on 30 June 2014 it was rescheduled for 16 July 2014. Subsequently, the applicant sent an email to the Ministry in which he wrote "This is making a fool out of people! This is not how it works in a serious country!" The applicant also sent an email to other candidates who were hoping to become court experts, appraisers and interpreters and were waiting to take the oath, saying "I phoned the State Secretary's Office at the Ministry of Justice on 11 June, but nothing can happen because that B.A. [the name of an employee] is on leave, [so] they said in the Cabinet, but we are not important. I suggest that the rest of you call [that office] and seriously complain; they have completely lost it ..." On 1 July 2014 the applicant's representative sent a complaint to the Ministry expressing

dissatisfaction with the delays, this time due to the rescheduling of the oath-taking ceremony, and alleging that the Ministry had acted unlawfully and in breach of the Constitution, and that its conduct was unprofessional and unacceptable. On 4 July 2014 the Minister informed the applicant that on the basis of the content of his blog, the complaint of 1 July 2014 (see paragraph 11 above) and the fact that the applicant had forwarded to other candidates emails in which he had made insulting remarks about the work of the Ministry, he had justifiable doubts as to whether the applicant, as a candidate for the title of court expert, had the required personal qualities as determined by section 87 of the Courts Act (see paragraph 23 below). The applicant, represented by a lawyer, replied to the Minister's letter, arguing that the Ministry had taken his criticism as an insult, and that the decision on his appointment had already been made, so dismissing his application at that stage would be characteristic of the Ministry's unprofessional work and an authoritarian State. His representative also alleged that the applicant's blog was insignificant, had no intention to offend and was unrelated to his profession. On 21 August 2014 the Minister dismissed the applicant's application for the title of court expert. He referred to the applicant's complaints about the Ministry's work and noted that after the complaint of 1 July 2014 (see paragraph 11 above) had been received, officials had learned of the applicant's blog "Politics, the kitchen and chicks" (see paragraph 4 above) from the Internet. The Minister noted, inter alia, "[the applicant] not only writes critical social commentary columns, but also writes offensively about State bodies, visible representatives of political and social life, and certain other persons". Furthermore, he considered that the applicant, in numerous emails, had inappropriately and in an insulting manner requested that the Ministry and its employees organise the relevant oath ceremony before the summer holidays. " (Cimperšek v. Slovenia, paras. 8 - 14)

The Administrative Court upheld the decision of the Minister of Justice by restating the arguments of the Minister, whereas the Supreme Court and the Constitutional court dismissed the applicant for failure to prove legal interest for extraordinary appeal and for failure to exhaust legal remedies.

Reasoning (role of the Charter or other EU, ECHR related legal basis)

First, the Court agreed with the government that the Minister has not revoked but refused the title of court expert, since the procedure was still ongoing and would finish only when the applicant would took his oath.

Second, the Court recognized that the refusal to appoint a person as a public servant cannot, as such, provide the basis for a complaint under the Convention, since the ECHR does not protectthe right of access to public service. However, the Court referred the approach, taken with regardsto private life. Article 8 ECHR would be found applicable in employment related cases, when“factors relating to private life were regarded as qualifying criteria for the function in question, andwhen the impugned measure was based on reasons encroaching upon the individual’s freedom ofchoice in the sphere of private life.” (para. 57). The Court stated that the same approach should betaken with regards to Article 10 ECHR. The Court found that “the disadvantage which the applicant suffered was directly related to his exercise of core elements of [the freedom of expression] and that “the dismissal also had a potentially chilling effect on the exercise of freedom of expression of those wishing to perform the function of court experts.” As a result, the case indeed revolved around the interference with the freedom of expression.

With regards to the justification of the interference, the government relied on “maintaining the authority and impartiality of the judiciary” from Article 10(2) of the ECHR. The Court used the general principles evolved in cases concerning judges (e. g. Baka, Kudeshkina) and public prosecutors (e. g. Kayasu). This was a consequence of the fact that it had earlier (in this decision) recognized that in the Slovene legal system, court experts are regarded as assistants of the court and thus form part of public service in the administration of justice. It reiterated that public officials serving in the judiciary should show restraint in exercising their freedom of expression in all cases where the authority and impartiality of the judiciary are likely to be called into question. However, the supervision of the Court in such cases is strict because of the importance of the right in question. Therefore, the necessity of any restriction must be convincingly established. The Court held that the absence of an effective judicial review may support the finding of a violation of Article 10.

Turning to the facts of the present case, the Court found that neither the Minister nor the national courts have balanced the applicant’s freedom of expression against the legitimate interest of protecting authority of the courts and public trust and confidence into the judiciary. The Minister considered both blog and emails to be offensive, but failed to provide examples of the allegedly offensive wording; neither did he in any other way specify the language used, which he considered offensive. This was found to be particularly noteworthy, since a few days earlier, the applicant was deemed fit for court expert. The Administrative Cout relied solely on the decision of the Minister and also turned a blind eye to freedom of expression concerns.

In the end, the Court accepted “that the behaviour of a candidate for the title of court expert can be such as to give rise to reasonable doubts as to whether the candidate will perform the work of an expert impartially and diligently.” However, “the absence of a detailed statement of reasons in the Minister’s decision and the Administrative Court’s judgment as to why the applicant’s exercise of his right to free expression was offensive and as such incompatible with the work of a court expert,” and “the fact that neither the Minister nor the Administrative Court undertook any assessment of whether a fair balance was struck between the competing interests at stake” prevented the Court “from effectively exercising its scrutiny as to whether the domestic authorities had implemented the standards established in its case-law on the balancing of such interests. As a consequence, the Court concluded that the interference with the applicant’s freedom of expression was not necessary in a democratic society” (paras. 68, 69). The chamber of the ECtHR unanimously found a violation of Article 6 (1) and Article 10.

Connected national caselaw / templates

Constitutional Court, Decision U-I-145/03 of 23 June 2005; Constitutional Court, Decision Up-150/03 of 12 October 2005; Pe?nik v. Slovenia, app. no. 44901/05, 27 September 2012

Constitutional Court, Up-309/05-25 of 15 May 2008; ?eferin v. Slovenia, app. no. 40975/08, 16 January 2018

Constitutional Court, Decision Up-455/15 of 24 January 2019

Supreme Court, Order II Up 1/2019/9 of 22 January 2020

Deputy President of the Supreme Court, Decision SuZ 53/2020 of 11 August 2020

Other

The principles developed by the ECtHR could arguably be extrapolated to judicial and state prosecutorial nomination procedures, since the Court did not shy away from invoking cases, involving judges, such as Baka, Harabin and Kudeshkina, and prosecutors (Kayasu). However, its impact could be regarded as limited, since the national authorities (the minister and the courts) had done a very poor job in justifying the interference, which could otherwise well prove to be in accordance with Article 10 ECHR.

The case shows the lack of affinity towards human rights protection in the public sector. It represents yet another episode in the series of freedom of expression violations, where the Slovene authorities struggle to gasp the essence of this right. Only slowly, after the ?eferin v. Slovenia case, the awareness is emerging that the protection of authority and reputation of the courts can limit the right of freedom of expression only when necessary in democratic society and that participants in judicial proceedings enjoy a certain degree of freedom in their critical and sometimes offensive communication with courts or other institutions, even though they could express their dissatisfaction in numerous more polite ways.

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History of the case: (please note the chronological order of the summarised/referred national judgments.)

1. Minister of Justice, decision of 21 August 2014 (not available)
2. Administrative Court, judgment IV U 206/2014 of 7 April 2015
3. Supreme Court, Order X Ips 192/2015 of 16 September 2015
4. Constitutional Court, Order U-I-188/15-9 and Up-899/15-11 of 19 April 2016.